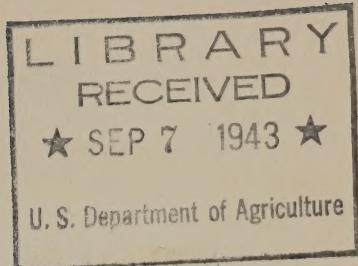


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NEW JERSEY STATE MILK CONTROL ACT

PAPER NO. 5. Series on State Milk Control Acts, Dairy Section,
Agricultural Adjustment Administration, United States Department
of Agriculture.

February 12, 1937.

Introduction

This is one of a series of papers designed to make available in a condensed and convenient form, information concerning State milk control acts, the type of regulations issued thereunder, and, in general, the legal developments in connection with their administration and enforcement. One paper will be devoted to each State having such an act.

It is expected that a general summary of all the State acts and regulations will be prepared when the review of individual State acts and regulations is completed. In this connection some comparison may be made. These papers omit much detail which might be helpful to those concerned with legislative or administrative problems of State milk control. Those who desire more complete information will undoubtedly find it to their advantage to get in touch with the officials charged with the administration of these acts.

STATE MILK CONTROL IN NEW JERSEY
THE ACT, ITS ADMINISTRATION AND LEGAL STATUS

PART ONE

I. General Character of Legislation.

The New Jersey act is an emergency measure^{1/}, enacted for the purpose of regulating the purchase, distribution and sale of fluid milk and cream. It continues, in amended form, the powers of a milk control board authorized by a law enacted in May 1933.^{2/} The enactment is declared to be an exercise of the police power of the State necessary for the immediate preservation of the public peace, health and safety, and its objectives are the prevention of various harmful practices in the milk industry, the providing of a reasonable return to the milk producer, and the insuring of a sufficient supply of fresh, wholesome milk to the people of the State. The emergency period during which the law shall be effective expires June 30, 1937.

Type of Governing Agency

The board is composed of five members, citizens of the State, appointed and subject to removal by the Governor, and receiving a per diem compensation and expenses. The board may appoint and prescribe the powers and duties of necessary technical and other assistants and employees, including a recording secretary who may be a member of the staff.^{3/}

Conditions Under Which Powers of Board May Be Exercised

The board is empowered to act on its own initiative in all matters over which it has jurisdiction. The exercise of its powers does not depend on any expression of approval or disapproval by any group or groups of the milk industry. The powers granted the board are extensive and while in certain cases rules are laid down under which the board shall act, for example, in licensing milk dealers and establishing prices, much is left to the discretion of the board, which, in most instances, may formulate its own rules and regulations as may be necessary to effectuate the purposes of the act.

Source of Financing

Maintenance of the board and expenses of its operations are met

^{1/} Chapter 175, Pamphlet Laws of 1935, approved April 29 and effective June 1, 1935.

^{2/} Chapter 169, Pamphlet Laws of 1933.

^{3/} The board has placed the principal responsibility of the administration on a secretary and his staff and has confined its own activities largely to final determinations on matters reaching it for consideration through the secretary.

by annual license fees paid to the board at the time of applying for license by milk dealers, including distributors, sub-dealers, processors and stores.^{4/} Such fees, ranging in amount from \$1 to \$800, are paid by the board to the State Treasurer and by him paid out on order of the board. Proceeds of adjustments of penalties collected by the board and proceeds of fines and costs imposed by any court are paid into the general fund of the State.

Statutory Protective Provisions

The act contains a separability clause, also a saving clause which declares that the act shall not in any of its provisions apply or be construed to apply to foreign or interstate commerce, except as it may be effective pursuant to the Federal Constitution, and laws enacted pursuant thereto.

II. Regulatory Provisions.

Powers of the Board

Investigation.— The board is empowered to investigate all matters pertaining to the production, importation, sale for manufacture, storage, transportation, disposal, distribution and sale of milk in the State. "Milk", here, means milk as defined in the act.^{5/} The power therefore covers all such matters as unfair trade practices, responsibility of dealers, law violations, and costs of production and distribution of milk. To support the power of investigation, the board may issue subpoenas to compel the attendance of witnesses and the production of books, papers and records, shall have "access to and may enter" all places where milk is being stored, bottled or manufactured into food products, and shall have power to inspect all books, papers, records or documents in any place within the State for the purpose of ascertaining facts to enable it to administer the provisions of the act. The act contains no provision requiring that information thus secured shall be regarded as confidential.

Mediation and arbitration.— The board may mediate or arbitrate issues arising among or between producers, milk dealers and consumers, as between themselves or that may arise between them as groups.

Cooperation with other authorities.— For the furtherance of objectives stated in the act the board may enter into agreements with

^{4/} Except stores selling milk or cream exclusively for consumption on the premises, or stores selling only canned milk or cream.

^{5/} "Milk" is defined as the product of dairy animals handled "with a view to being sold as milk for consumption in fluid form and also cream, ice cream mix, buttermilk and skimmed milk, sold or intended to be sold as such for food, and any flavored fluid sold, advertised or held out as a milk drink." The term "milk" excludes such product sold or intended to be sold for any other purpose, or when sold as condensed or evaporated milk in hermetically sealed cans.

State, county and municipal agencies and with other States and the Federal Government. Before such agreements shall be declared in effect they must be ratified by a majority vote of the board.

Licensing powers.— Every milk dealer as defined in the act^{6/}, viz., dealer (distributor), processor, sub-dealer, producer-dealer and store, is required to be licensed. In applying for a license the applicant shall enclose the required license fee, submit information as to the nature of his business, and state "that he has complied with all the rules and orders of the board." The license is in addition to any other license or permit required by any law of the State, or by any ordinance of a local board of health, and may not be granted or be operative if granted, with respect to a particular municipality, during such time as the State Department of Health or a local board of health shall refuse to license or shall suspend or revoke the right of a licensee to sell or distribute milk or cream therein. The board, after hearing, may decline to grant a license, or may suspend or revoke one already granted, when satisfied of the existence of certain facts, conditions or situations with respect to milk dealers, set forth in the act. Among these are: (1) failure to account and make payment, without reasonable cause, for any milk purchased from a producer; (2) the commission of any act injurious to trade or commerce or which may demoralize the price structure of milk or interfere with an ample supply of milk for the people of the State; (3) failure to keep records or furnish records as required by certain sections of the law; and (4) proof that the dealer has committed any act likely to undermine health regulations and standards as established by health laws and ordinances.

Records and reports.— The board may require licensees to keep such records and information as it may deem necessary for the proper enforcement of the act, including all pertinent facts as to milk bought from suppliers, sold to consumers and others, and classified as to grade, location and market outlet, quantity of each milk product manufactured and quantity of milk and cream used in its manufacture. Prices paid and amounts received may be a part of any such record. In addition, each licensee shall, from time to time as required by the board, make and file a verified report of all matters of which a record is required to be kept.

Bonding of dealers.— Bonding of dealers, sub-dealers and processors, though not specifically provided in the act, is required under

6/ "Milk dealer" is thus defined: "Any person who purchases for sale, produces for sale direct to consumers, purchases for distribution, distributing broker, any person who purchases, distributes, or handles within or without the State, for storage, manufacture, or sale in this State, except for consumption on the premises of the producer, milk and cream."

a separate act.^{7/} In addition, the board may promulgate and enforce credit regulations governing sales "between dealer, sub-dealer and processor."

Powers in Regard to Price Regulation

Prices to be paid producers.— The language of the section authorizing the board to fix prices to be paid producers, as well as resale prices, is as follows: "The board may ascertain, determine, and fix by investigations and proof, as the emergency permits, the minimum prices to be paid to the producer, the minimum prices to be charged by milk dealers to processors, sub-dealers and stores and the minimum prices to be charged the consumer for milk in the several municipalities or markets of this State, under varying conditions, as will best insure a sufficient quantity of pure and wholesome milk to the inhabitants of this State." As criteria for such price determination, "The board shall take into consideration the varying grades of milk produced, the varying percentages of butterfat, plant volume, seasonal production, and other conditions affecting the cost of production, cost of transportation and marketing, and the amount necessary to yield a reasonable return to the producer and to the milk dealer." The term "grades," used above, "shall be for the purpose of fixing prices only" and shall not conflict with or affect the status of board of health requirements. It is discretionary with the board whether in the fixing of prices it shall hold public hearings in which interested parties may participate.

Method of payment to producers; base-rating.— The act does not specifically empower the board to assign or authorize the allocation of bases to producers^{8/}, and nothing appears in the act to authorize market-wide pooling of milk. Legal basis for payment by dealers on the individual-distributor plan is apparently found in the power to fix "the minimum prices to be paid to the producer," although there is no mention of fixing producer prices for milk on the basis of "class use" by dealers.

Resale prices.— Authority for the fixing of minimum resale prices is found in the provision quoted above; also included there are the price-determining factors which the board shall take into consideration in fixing such prices.

Powers With Respect to Unfair Competition and Trade Practices

The board is authorized to exercise its general powers, subject to specified exceptions, "to control or prevent unfair, unjust destructive and demoralizing practices." The act also expressly declares that "the licenses required by the act are for the purpose of correcting" such practices.

^{7/} State bonding law, chapter 74, Laws of 1917, as amended.

^{8/} For the fixing of producer bases, called "norms," see Part Two.

Limitations and Exceptions

An important limitation on the general powers of the board is the provision that nothing in the act shall be construed as authorizing the board to adopt or enforce "orders, rules or regulations containing provisions of sanitary regulations," as defined in the act,^{9/} and that nothing in the act or rules or regulations adopted thereunder shall conflict or be construed to affect the status, force or operation of any sanitary regulations, or the act (as amended and supplemented) "to secure the purity of foods . . . drugs," etc., approved May 20, 1907. Another limitation or exception provides that it is not intended that milk "utilized or sold to be utilized for manufacturing purposes" shall be included in the determination of the license fee, nor may sales by a dealer of milk bought within or without the State and sold in another State be so included.^{10/} A provision in the nature of an exception, as regards producers' cooperatives, is referred to in the paragraph on cooperatives in this outline.

Violation

Unlawful acts.— Acts specifically declared unlawful apply only in the case of milk dealers. It is unlawful for a milk dealer (1) to buy milk from an unlicensed dealer, (2) to sell milk in New Jersey to an unlicensed dealer, (3) in any way to deal in or handle milk which he may have reason to believe has previously been dealt in or handled in violation of the provisions of the act, and (4) in the case of milk produced outside the State, when it shall have come to rest within the State, to sell such milk if it has been purchased from producers at a price lower than that required to be paid for milk produced within the State, purchased under similar conditions.^{11/} In addition, certain acts are prohibited. For example, a dealer shall not buy milk from producers or others, unless duly licensed; nor shall a dealer or sub-dealer^{12/} handle milk in the State which is obtained from any producer or from another dealer "where the milk has been bought either directly or indirectly for a price less than the price fixed by the board to be paid for milk to be distributed in a given market." Mutual or secret agreements or combinations, contrary to the public interest, on the part of licensees,

^{9/} "Sanitary regulations" means: "All laws enacted by the State of New Jersey; ordinances and regulations enacted or adopted by municipalities, municipal boards of health, or municipal departments, or officials exercising the powers and duties of local boards of health, relating to the production, handling, transportation, distribution and sale of milk within this State."

^{10/} For example, a milk dealer engaged in handling milk in New Jersey but selling milk only in another State "and/or engaged only in manufacturing" shall pay a straight license fee of \$25, but not a fee based on volume of sales, as is the case when engaged in intrastate handling.

^{11/} This last provision (section 703) is contained, with almost identical wording, in the New York milk control act (section 258-m.4), where it was held by the U. S. Supreme Court in the case of *Seelig v. Baldwin* to offend the commerce clause of the Federal Constitution.

^{12/} A sub-dealer is defined to mean "Any dealer who purchases milk from a processor or milk dealer for the purpose of sale or resale."

associations, corporations, or others, whereby the price of fluid milk to be paid producers is decreased, are also forbidden.

Penalties.— A violation of any provision of the act, or order, rule and regulation of the board shall be deemed a violation of the act and for such violation penalty is provided of not more than \$50 for the first offense and not more than \$200 for the second or each subsequent offense. Seizure is authorized of any milk or cream or milk products which are the subject of the violation, and any part thereof may be sold as the board or court may direct, the proceeds to be paid to the State Treasurer. For refusing to obey a subpoena issued by the board, imprisonment in the county jail is, under certain circumstances, provided.

Legal Remedies

Board.— Upon written, verified complaint of violation of any provision of the act — and when made by the secretary of the board such complaint may be made upon information and belief — certain specified courts are empowered to issue process, in the nature of a summons, at the suit of the board, as plaintiff. The court shall proceed, thereafter, "in a summary manner, without a jury," to hear testimony and to determine and give judgment in the matter. There shall be no filing of any pleadings, either for the plaintiff or defendant. If judgment be rendered for the plaintiff, the court shall cause any such defendant who may refuse or neglect forthwith to pay the amount of such judgment and all the costs and charges incident thereto, to be committed to the county jail for any period not exceeding 100 days. Another remedy of the board, to assist it in enforcement, lies in its power to file a bill in the Court of Chancery, for an injunction to prohibit any habitual violation of the act. Cases of emergency shall have precedence over other litigation then pending. In addition to the legal remedies of the board just stated, the act provides the manner in which the subpoena process shall be enforced, including the provision that a justice of the Supreme Court shall, upon satisfactory proof of refusal to obey the board's subpoena, issue an attachment for arrest and have power to enforce, by imprisonment in any county jail, obedience to such subpoena, and to compel payment of the costs of such proceedings, to be taxed by the court.

Aggrieved parties.— Authorization to apply to a justice of the Supreme Court for a writ of certiorari is granted to anyone applying to the board for a license, or to a licensee, when aggrieved by any action of the board taken pursuant to the act. Application for the writ shall be made within 30 days after receipt of the order causing grievance. The court may suspend, reverse, vacate or modify the order. In its discretion, the court may require the aggrieved person, prosecutor of the writ, to execute a satisfactory surety bond, conditioned for the prompt payment by the said prosecutor "of all costs and/or damages arising from or caused by the delay in the effectiveness or enforcement of the order complained of or in the prompt prosecution of his writ."

Status of Cooperative Associations of Producers

In the paragraph defining "milk dealer," it is stated that "Any dairy cooperative association organized under any law of this or any other State and engaged in this State in the handling of milk¹³ as hereinafter defined, is declared to be a milk dealer or producer within the meaning of this act as the board may determine." Elsewhere it is provided that no provision in the act shall prevent "a cooperative association or cooperative corporation approved by the board" and selling milk of or for its members or contractees, from blending the proceeds of all net sales made for such producers either within or without the State and paying on such basis. No such cooperative association or cooperative corporation, however, shall otherwise be exempt from the orders, rules, or regulations of the board. The only specific reference to "check-off" occurs in the section prohibiting the making of a mutual or secret agreement or combination to reduce the price to be paid to producers or paid by consumers. Therein it is provided "that the right may be granted to deduct a check-off to be paid an association or corporation with consent of producer and approval of the board"¹⁴/

PART TWO

I. Administrative Procedure, Rules, . . . Regulations and Orders.

Extent of the board's authority.— Exercise of the powers of the New Jersey Milk Control Board is State-wide and extends over all milk dealers in their activities as handlers of milk. The State has been divided by the Board into five marketing areas, each considered as having marketing conditions somewhat different from the others. These areas are described as follows:

Area Number 1 includes Mercer, Burlington, Atlantic, Cape May, Cumberland, Salem, Gloucester, and Camden Counties, except those sections included in Area Number 2.

Area Number 2 includes all shore points between Brigantine Inlet and Cape May, including the municipalities of Egg Harbor and Mays Landing and the territories adjacent to these shore points that are naturally included in such marketing area.

Area Number 3 includes the portions of Monmouth and Ocean Counties bordering on the Atlantic Ocean, including the coastal area designated as the north shore resort section. The municipalities of Morgan, Keyport, Red Bank, Long Branch, Asbury Park, Lakewood, Toms River, and points south to Brigantine Inlet, which separates the counties of Ocean and Atlantic, are included in this area.

Area Number 4 includes Bergen, Passaic, Essex, Hudson, Union,

13/ The phrase "handling of milk" is not specifically defined, and must be understood in the light of the definitions of "processor," "sub-dealer", "store", "licensee", etc.

14/ The word "cooperative" is not used to qualify "association" or "corporation."

Morris, Somerset, and Middlesex Counties.

Area Number 5 includes Sussex, Warren, and Hunterdon Counties and the sections of Monmouth and Ocean Counties not included in Area Number 3.

Persons controlled or affected.— All milk dealers are required to be licensed by the board, including the dealer who distributes fluid milk and fluid cream in bottles or cans to consumers, the producer-dealer, the processor, sub-dealer, and store.^{15/} Even the dealer who handles milk in the State but sells it only in another State is licensed. To the extent that authority over licensees or others is granted to the board by the act, whether in the matter of price-fixing or otherwise, such authority has been widely exercised.

Classification for purposes of price determination.— In establishing resale schedules, the following classifications are used: Grade "A" fluid milk, fluid milk other than Grade "A", heavy, medium, and light sour cream, and buttermilk.

For the purpose of establishing minimum prices to be paid producers, milk is classified as follows:

Class I milk includes all milk purchased, received or handled, which is marketed as fluid milk, flavored milk, cultured milk, or creamed milk.

Class II milk includes all milk purchased, received or handled, which is separated into cream and marketed as fluid cream, sweet cream or sour cream.

Class III milk includes all milk purchased, received or handled, which is in excess of the established norm^{16/} (base), and which is used for manufacturing purposes.

Producer norms (bases).— Throughout the State, either by express order of the board, or by authorized agreement between the producers and the dealer to whom they sell their milk, each producer is allotted a certain quantity of milk called a yearly norm. For purposes of payment a norm represents or is based on his average monthly production during the year, or ten months of the year, or some other period preceding the time of the allotment. For milk produced in excess of such norm, the Class III or excess price is paid, unless actually utilized by the dealer in Class I or Class II.

^{15/} For the fiscal year, ending June 30, 1935, the number of dealers' licenses issued was 2,605. To this should be added licenses issued to storekeepers of whom, for the preceding fiscal year, 3,060 were licensed. See page 55, Report of Board, May 24, 1933-June 30, 1935.

^{16/} Norm milk (meaning milk not in excess of the norm or base established for each producer), Grade A or other than Grade A, shall be paid for at the Class I or Class II price, according to its utilization in these two classes.

Trade practices.— The board has prohibited certain acts of the nature of unfair trade practices; for example, the use of any method or device, such as a discount, rebate, free service, advertising allowance, or combination sale, whereby milk or cream is sold or offered for sale at a price less than that fixed by the board. The rejection by a dealer, without cause, of a producer's milk and the withdrawal of milk, without cause, from a dealer by a producer, are two practices declared to be unfair by the board. Certain acts or procedures are, on the other hand, declared fair practices, as, for example the promulgation of producer norms.^{17/}

Records and Reports

The board has required every milk dealer buying milk from producers "and/or" importing milk or cream into the State to keep books of record and account and other data readily available at his principal place of business, including a monthly record (1) of all milk and cream produced by the dealer's own herd, whether in or outside of the State, and (2) of all purchases of milk or cream from producers and dealers, detailed as to amounts, prices, butterfat content and other differentials. In addition, full information is required with respect to such matters as route and store sales, sales to welfare organizations and to the State, municipal and Federal government classifications at resale, utilization, wastage, and "spread of processing and distribution expense." Regular monthly reports to the board are required of milk dealers and in some instances, weekly reports. Cooperatives paying producers a blended price for milk produced in New Jersey, are required to file with the board a monthly report giving the quantities and prices for each classification which enters into the determination of such blended price. In addition, dealers buying milk or cream from producers, when making final payment each month, must render to each producer a statement showing the amount of his norm milk sold for fluid consumption, his norm milk which was separated into cream, the excess over his established norm, the butterfat test, etc.

Hearings

The board has held public hearings in a number of places in the State to aid in the determination of prices, producer norms and many other matters within the jurisdiction of the board. In cases where emergency situations have existed justifying immediate action, hearings have sometimes been dispensed with.

PART THREE

Legal Status

Litigation.— Enforcement of the provisions of the New Jersey

Milk Control Act has been vigorously prosecuted by the board and accordingly there have been a great many cases litigated in the courts. A majority of violations have consisted of operating without a license, price cutting, making improper payments to producers, and failing to file reports. During the first two years of the act, the Secretary of the board conducted nearly 1500 hearings on violations, and penalties of nearly \$13,000 were collected. Several hundred cases have been filed in district or common pleas courts throughout the State, a majority of them having been settled without a trial. A number of injunction suits have been filed and successfully prosecuted by the board. In certain cases, dealers have been enjoined from handling milk at less than minimum prices fixed by the board, or have been restrained from engaging in business after their licenses were revoked or their applications for licenses denied.

Constitutionality of act upheld.— The constitutionality of the New Jersey Milk Control Act was upheld by the Court of Errors and Appeals on May 21, 1935, in an appeal from an interlocutory order issued by the Court of Chancery enjoining the Newark Milk Company, until further order of the court, from selling milk at retail at prices less than those fixed by the board.^{18/}

The chief question before the Court of Appeals and Errors was: Does the Legislature have authority, by enactment of the milk control law, to regulate and control the milk industry of the State? This question the court answered in the affirmative upon the authority of the Supreme Court of the United States in the case of *Nebbia vs. New York*, (291 U.S. 502). Allegations involving the delegation of legislative and of judicial power were rejected by the court. But in one respect the order of the Court of Chancery was ordered to be modified. The order had enjoined "implicit obedience of . . . all future orders of the milk control board." This, the high court declared, was an excess of power and the lower court could not properly command obedience of all things required to be done in the future.

18/ In Re: State v. Newark Milk Company, 179 Atl. (N.J.) 116.